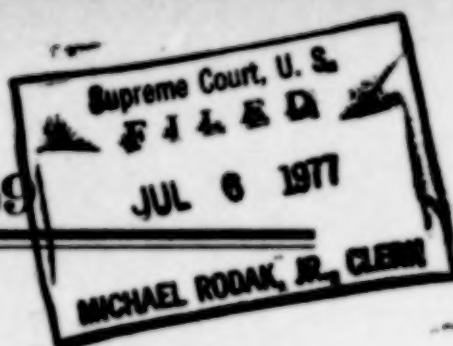


No. 76-1149



**In the
Supreme Court of the United States**

OCTOBER TERM, 1976

JOHN D. CAREY, et al.,

Petitioners,

vs.

**JARIUS PIPHUS, A Minor, and GENEVA PIPHUS, Guardian
Ad Litem for JARIUS PIPHUS,**

Respondents.

JOHN D. CAREY, et al.,

Petitioners,

vs.

**PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO,
A Minor, and CATHERINE BRISCO, Guardian Ad Litem for
SILAS BRISCO,**

Respondents.

**BRIEF OF
NATIONAL SCHOOL BOARDS ASSOCIATION
AS AMICUS CURIAE**

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**BRIEF OF
NATIONAL SCHOOL BOARDS ASSOCIATION
AS AMICUS CURIAE**

INTEREST OF THE AMICUS CURIAE

Amicus Curiae, National School Boards Association, is
a nonprofit federation of this nation's state public school

boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public schools, and to preserve the unique American tradition of local lay control, with educational policy decisions rendered by those directly accountable to the public through the elective or appointive process. In its thirty-seventh year, National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who make up this nation's school boards are predominantly lay elected or appointed community representatives, responsible under state law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions.

National School Boards Association submits this brief with the conviction that the decision of the United States Court of Appeals for the Seventh Circuit should be reversed because it erroneously holds that local school board members should be liable for general compensatory damages when students are suspended from school without a constitutionally adequate due process hearing, even when the school officials acted without actual malice and the students suffered no actual injury. Amicus further believes that the decision of the Court of Appeals should be reversed because it improperly interferes with the ability of the nation's school boards to govern effectively the schools entrusted to their care by the local communities to whom they are responsible. The concept of local lay control of the nation's public schools, a concept rooted

in considerations of comity, federalism and sound educational policy, requires that the decision of the Court of Appeals be reversed.

The parties have, pursuant to Supreme Court Rule 42.2, consented to the filing of this brief.

ISSUE PRESENTED FOR REVIEW

Whether a public school student is entitled to general compensatory damages because he was suspended from school without a constitutionally adequate due process hearing, even though the school officials acted without actual malice and the student fails to establish that he suffered any actual injury.

STATEMENT OF THE CASE

Amicus Curiae relies on the statement of the case set forth in the brief for petitioners.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution (in pertinent part):

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1988 of Title 42 of the United States Code:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

SUMMARY OF ARGUMENT

The Court of Appeals for the Seventh Circuit held that public school officials are liable for general compensatory damages if they suspend a student from school, without a constitutionally adequate due process hearing, even if the school officials acted without actual malice, and the student fails to prove that he suffered any actual injury. According to the Court of Appeals, a student need not sustain the burden of proving actual injury because the existence of general compensatory damages is presumed from the fact of the constitutional violation itself. If a technical violation is established, damages must be awarded in an amount "neither so small as to trivialize the right nor so large as to constitute a windfall." *Piphus v. Carey*, 545 F.2d 30, 32 (7th Cir. 1976) (footnote omitted).

The threat of liability for substantial damages, in a highly speculative amount, will seriously impede the work of the public schools. The recruitment of qualified candidates for school board positions will certainly be encumbered if school board members, who generally serve without remuneration, must contemplate using their personal financial resources to satisfy judgments of this nature during their terms of service. The cost to the public schools from this loss of human resources would be immense. If school districts, on the other hand, undertake to indemnify school board members in these circumstances, as an inducement for them to serve, already scarce public funds would be further diverted from the schools' principal task of providing educational services. In either event, liability for general compensatory damages will cause a serious dislocation of traditional arrangements for managing public education.

The absence of a compelling need for imposing this difficult choice on local communities is underscored by the fact that an award of general compensatory damages,

without proof of actual injury, would necessarily constitute a windfall to the student whose rights have been technically violated, regardless of the amount of the judgment. Moreover, the allowance of general compensatory damages would effectively sanction an award, which must by definition be punitive in nature, without requiring the proof of aggravating circumstances or actual malice which is the normal prerequisite for punitive damages.

Congress has charged the federal courts with the task of fashioning appropriate legal and equitable remedies for the enforcement of the federal civil rights acts. 42 U.S.C. § 1988 (1976). In fashioning appropriate remedies, the courts must be guided by existing federal law, where applicable, and by the common law, as modified by the constitutions and laws of the states. Existing legal principles will not support an award of general compensatory damages for a technical violation of a student's due process rights.

Even in actions to redress racial discrimination and to protect the exercise of First Amendment rights, the federal courts have required that damage awards be principled and measured. When public employees have been discharged for constitutionally impermissible reasons, for instance, the courts have allowed them to recover only the difference in salary between that which they would have earned if they had retained their employment with the government, and that which they reasonably could have earned through suitable alternative employment. In this context, the courts have emphasized the compensatory character of damage awards; they have not allowed an additional award of general compensatory damages based on the unconstitutionality of the discharge itself. At most, the courts have awarded nominal damages in recognition of the technical breach of a legal duty which does not result in actual injury. The allowance of general compen-

satory damages is inconsistent with the restitutive nature of compensatory damages, and with the background of tort principles against which remedies for Section 1983 violations have traditionally been fashioned in the federal courts. 42 U.S.C. § 1983 (1974).

Moreover, it is clear that vigilant enforcement of the civil rights acts neither requires nor warrants the creation of a general compensatory damage remedy in these circumstances. Adequate means for enforcement of the civil rights acts exist without this added deterrent. In most cases, it may be assumed that some actual injury will result from significant infringements of federal civil rights, and that actual compensatory damages will be proved. Moreover, proof of actual malice or other aggravating circumstances may justify an award of punitive damages. Injunctive and declaratory relief are also available. The federal courts may also encourage the vindication of federal constitutional rights by allowing an award of attorneys' fees to the prevailing party in civil rights litigation. Finally, a wilful deprivation of civil rights may lead to criminal prosecution.

This Court has previously recognized that effective local lay control of the public schools requires that the intervention of the federal courts in school matters should be narrowly tailored to remedy existing constitutional violations, without unduly interfering with the local management of the schools. General compensatory damages are not necessary for the effective vindication of constitutional rights and, because of their inherently speculative nature, they would seriously interfere with the efficient management of the public schools.

For these reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed.

ARGUMENT

Introduction

This case presents a question of acute importance to the continued viability of local lay control of the nation's public schools: whether local school officials must be held liable for general compensatory damages when the constitutional due process rights of students are violated, without actual malice on the part of school officials and without proof of actual injury to the students affected. In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court held that local school officials enjoy a qualified immunity from liability in Section 1983 damage actions. The Court held that a school official may be liable for *compensatory* damages "only if the school board member acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Id.*, 322. The Court did not consider the precise nature of the compensatory damages to be awarded.

In this case, the United States District Court for the Northern District of Illinois held that the plaintiff public school students were denied due process when they were suspended from school without constitutionally adequate hearings. The district court found that the defendant school officials were not improperly motivated, but held that they should have been aware that their procedures did not comply with constitutional requirements.¹ While

¹ Silas Brisco was suspended from school on September 11, 1973. Jarius Piphus was suspended on January 23, 1974. Both suspensions occurred prior to this Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975). The district court held, however, that the defendant school officials should have known that Brisco and Piphus were entitled to some type of adjudicative hearing pursuant to the Seventh Circuit's decision in *Linwood v. City of Peoria*, 463 F.2d 763 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

the district court found that defendants were not immune from liability under the principle established in *Wood*, the court held that plaintiffs were not entitled to damages because they had failed to prove that any actual injury resulted from the denial of due process. *App.* 14.² The Court of Appeals for the Seventh Circuit reversed the judgment of the district court, holding that plaintiffs were entitled to an award of general compensatory damages, without proof of individualized injury, because the right to general compensatory damages is inherent in the due process violation itself. The Seventh Circuit held that the damage award "should be neither so small as to trivialize the right nor so large as to provide a windfall." *Piphus v. Carey*, 545 F.2d 30, 32 (7th Cir. 1976) (footnote omitted).

The principle adopted by the Seventh Circuit authorizes damage awards against public school officials, in a speculative and uncertain amount, for negligent deprivations of federal constitutional rights that do not result in actual injury to students. If approved by this Court, the principle articulated by the Seventh Circuit would seriously affect the continued viability of local lay control of this nation's public schools. As the Court noted in *Wood*, "The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure." *Wood v. Strickland*, 420 U.S. 308, 320 (1975) (footnote omitted). The persistent threat of open-ended liability, in the nature of general compensatory damages, would further encumber the already difficult task of persuading competent and respon-

² References to Appendix A, Petitioners' Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit, are designated herein as "App."

sible citizens to lend their services, usually without remuneration, to the management of public education. Moreover, even if school districts were to indemnify board members, as an encouragement for them to serve, scarce public resources would be diverted from the schools' principal task of educating students.

In *Wood*, the Court recognized that strong considerations of public policy would favor an absolute immunity for public school officials. The Court held, however, that countervailing policy considerations required that the immunity of school officials should be qualified. "[A]bsolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Id.* While the Court held that public school officials are not absolutely immune from liability for compensatory damages, the policy considerations supporting a qualified immunity from liability for actual compensatory damages also require that the principle established in *Wood* should not be extended to sanction liability for general compensatory damages. In the absence of actual injury, the need to provide a remedy for deprivations of students' rights, which informed the Court's decision in *Wood*, loses its force.

I.

The Court Of Appeals Erred In Holding That Plaintiffs Were Entitled To General Compensatory Damages For A Technical Denial Of Their Due Process Rights, Without Proof Of Actual Injury, Because Generally Accepted Legal Principles Preclude An Award Of Damages Or Allow Only Nominal Damages In These Circumstances.

Traditionally, the common law has awarded compensatory damages to an injured party as compensation, indemnity or restitution for actual injury sustained by him. *Restatement of Torts* § 903 (1939). "The law of torts has a reparative effect; it preserves economic stability by providing money substitutes for losses." Morris, *Punitive Damages In Tort Cases*, 44 Harv.L.Rev. 1173 (1931). Compensatory damages are not allowed in the absence of actual injury.³ The federal courts have followed these prin-

³ While compensatory damages will not be awarded in the absence of proof of actual injury, compensatory damages are sometimes awarded without proof of the *amount* of actual loss caused by the injury. With respect to certain torts, such as libel and slander per se, the law generally presumes that actual damages naturally result from the mere fact that the tort was committed:

When general damages are awarded in cases of libel or slander per se, they often represent a reasonable guess, or at least some kind of guess, that actual damages have been sustained, though the amount is not capable of proof. If a man is called a communist, he may not lose his customers or friends, but he may nevertheless lose their confidence in some unprovable way, and this may indeed cost him money in the future even though he could never hope to prove it. Thus one important factor in the award of general damages is some estimate, however rough, of the probable degree of *actual* loss a man will suffer given the particular charge against him, even though that loss cannot be identified in money terms.

D. Dobbs, *Handbook On The Law Of Remedies* § 7.2, pp. 513-4 (1973) (footnote omitted) (emphasis in original).

(footnote continued)

ciples in compensating victims for tortious interference with their federal civil rights. Numerous cases exist in which state officials have violated First Amendment free-

(footnote continued)

The rationale for general damage awards in cases of libel and slander per se rests on a presumption that these types of defamation generally give rise to actual damages, as a matter of course, but that the precise nature and extent of the damages may be inordinately difficult to prove within the time limits necessarily imposed on trials. It would be impossible, of course, to receive testimony from everyone in the community who might have been influenced by the defamation. For policy reasons, therefore, the law of torts modifies the customary burden of proof in cases of libel and slander per se, so as to allow an award of general damages without proof of the extent of actual loss. The policy reasons underlying this rule are inextricably interwoven with the substantive policies and principles of the law of defamation. Indeed, they are peculiar only to the law of libel and slander per se, inasmuch as general damages are not allowed in cases of slander per quod. "All other slanderous words, no matter how grossly defamatory or insulting they may be, which cannot be fitted into the [four traditional and] arbitrary categories . . . , are actionable only upon proof of 'special' damage—special in the sense that it must be supported by specific proof, as distinct from the damage assumed to follow in the case of libel or the kinds of slander already considered." W. Prosser, *Handbook Of The Law Of Torts* § 112, p. 760 (4th ed. 1971). The law of damages in defamation cases is unique because of policy considerations peculiar to the substantive law of defamation as well as uneven historical development within the law of defamation. Consequently, the damage principles developed in this area are not readily transferable. Neither do they provide any assistance whatsoever in determining whether general compensatory damages should be allowed in federal civil rights cases. In cases of slander per se and libel, the law allows an award of general damages to compensate for actual loss. In cases of technical violations of a student's due process rights, actual loss is not self-evident and, consequently, it would be inappropriate to allow general damages by analogy to the law of defamation.

doms, discriminated on the basis of race, or denied citizens their constitutional right to due process of law. In these cases, the federal courts have allowed compensatory damages upon proof of actual injuries, including mental distress, pain and suffering, and pecuniary losses, resulting from the deprivations.

Federal courts have not allowed compensatory damages, in a substantial amount, for purely speculative harm "inherent" in the constitutional deprivation itself. In those cases where the courts have awarded damages based on an "inherent injury" theory, they have limited recovery to a symbolic award in a nominal or trifling amount. The federal courts have adhered to generally accepted legal principles which preclude the award of substantial damages in the absence of proof of actual injury.

While Congress has charged the federal courts with the task of fashioning appropriate remedies in actions for redress of civil rights violations, the discretion of the courts is narrow. 42 U.S.C. § 1988 (1976). The courts are not licensed to devise novel sanctions in fashioning appropriate remedies for violations of civil rights. The Court of Appeals for the Seventh Circuit erred in directing the district court to award general compensatory damages in the present case.

A. In Fashioning Interstitial Adjustments Of Remedies For Redress Of Civil Rights Violations, The Federal Courts Must Be Guided By Traditional Principles Of The Law Of Remedies.

Section 1983 establishes a private cause of action for persons who have been deprived of their federal constitutional rights by state officials or other persons acting "under color of state law." 42 U.S.C. § 1983 (1974). Section 1983 does not, in terms, authorize any particular type

of damage remedy for deprivations of civil rights under color of state law.⁴ "Section 1983 . . . is completely silent as to the kind of damages which may be awarded an injured plaintiff in a civil rights suit." *Basista v. Weir*, 340 F.2d 74, 85 (3rd Cir. 1965). Instead, Congress provided only that persons acting to deprive another of his federal civil rights, under color of state law, should "be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1974). As the Third Circuit said in *Basista*, the language of the statute "[o]bviously . . . connotes damages of some kind, but goes no further." *Basista v. Weir*, 340 F.2d 74, 85 (3rd Cir. 1965). Logically, the right to proceed in an action at law would seem to entail the right to prove and recover actual compensatory damages. It is well-established that a Section 1983 plaintiff may, within the terms of the statute, recover damages sustained because of official conduct which violated his federal civil rights. See, *Monroe v. Pape*, 365 U.S. 167 (1961). "The plain words of the statute impose liability—whether in the form of payment of redressive damages or being placed under an injunction—only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976).

⁴ Section 1983, was originally enacted as Section One of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13. Congress enacted this legislation pursuant to its constitutional power to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. Congress could have provided specific remedies for violations of Section 1983. Indeed, if Congress were to determine that an unusual remedy, such as general compensatory damages, should be allowed in Section 1983 cases, Congress could specifically so provide. In the absence of congressional action, the federal courts are bound to follow customary principles of damages. 42 U.S.C. § 1988 (1976).

While Congress did not designate specific remedies, in Section 1983, for the vindication of federal civil rights, Congress did provide a general framework for judicial fashioning of remedies in civil rights cases. In Section 1988, Congress provided that the federal courts should be guided by the laws of the United States, to the extent that they are applicable, and by the common law of remedies, as modified by the constitutions and laws of the states, in providing appropriate relief for violations of federal civil rights. 42 U.S.C. § 1988 (1976). This Court had occasion to construe Section 1988 in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969). The Court said:

This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. . . . The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.

Id., 240.

The Court's construction of Section 1988 is consistent with the general power of the federal courts to supply interstitial remedial details when Congress has omitted to do so. The incorporation of state statutes of limitation provides a useful analogy: "The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Holmberg v. Ambrecht*, 327 U.S. 392, 395 (1946). By enacting Section 1988, Congress effectively delegated to the federal courts the task of fashioning appropriate remedies, within the framework of familiar legal principles, for violations of the federal civil

rights acts. *Moor v. County of Alameda*, 411 U.S. 693, 698-707 (1973).

As the Court noted in *Sullivan*, the formulation of appropriate remedies for the enforcement of the federal civil rights acts must be informed by a proper understanding of the precise need for specific types of relief. "The rule of damages . . . is a federal rule responsive to the need." *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240 (1969). Moreover, the Court must be guided both by familiar principles within the law of remedies and by constitutional principles of comity and federalism, as well as by the legislative purposes of the federal civil rights acts. Remedies must be carefully measured in that they must assist in the vindication of constitutional rights without needlessly disrupting the administrative processes of the states. Obviously, even the most effective deterrent may not be adopted if it places an unnecessary or disproportionate burden on legitimate state activities. *Rizzo v. Goode*, 423 U.S. 362 (1976).

B. The Federal Courts Have Not Traditionally Allowed An Award Of General Compensatory Damages For A Bare Violation Of Constitutional Rights, Without Proof Of Actual Injury, Even In Areas Subject To Special Scrutiny Such As First Amendment Activity And Racial Discrimination In Public Employment.

In the present case, the Court of Appeals held that the district court erred in failing to award general compensatory damages to Piphus and Brisco. The Court of Appeals reasoned that the school officials' failure to afford adequate due process procedures, prior to the students' suspensions, gave rise to an action for damages which are "inherent in the nature of the wrong" and may be awarded without proof of actual loss. *Piphus v. Carey*, 545 F.2d

30, 31 (7th Cir. 1976). The court further held that the award of general compensatory damages should be in an amount "neither so small as to trivialize the right nor so large as to provide a windfall." *Id.*, 32 (footnote omitted).

If plaintiffs had sustained their burden of proof, they would have been entitled, of course, to an award of special compensatory damages for any actual injury which they suffered as a result of defendants' failure to afford adequate hearings prior to their suspensions. An award of special damages might have encompassed elements such as mental distress and the value of the school days lost because of the invalid suspensions. *Id.*, 31-2.⁵ To recover special damages, plaintiffs would have been required to establish causation: "These damages . . . and any others flowing from the suspension . . . would be recoverable only if a plaintiff's suspension would not have occurred absent the due process violation." *Id.*, 32.⁶ According to the Sev-

⁵ The Court of Appeals affirmed the district court's finding that plaintiffs had failed to prove the existence of any actual injury, such as mental distress. *Piphus v. Carey*, 545 F.2d 30, 31 (7th Cir. 1976). The Court of Appeals held, however, that the district court erred "in not considering the possibility of special damages for the school days plaintiffs lost as a result of their suspensions." *Id.*, 32. Neither of these holdings with respect to special damages is presently before the Court.

⁶ The Court of Appeals was obviously correct in requiring that causation be established to support an award of actual damages. In *Mt. Healthy School District v. Doyle*, _____ U.S. _____, 97 S.Ct. 568 (1977), a non-tenured teacher alleged that he had been discharged in violation of his First Amendment rights. He sought reinstatement and damages. The district court found that Doyle's First Amendment activity had played a *substantial* part in the school board's decision to terminate his employment, and the court ordered that he be reinstated with back pay. The Court of Appeals af-

(footnote continued)

enth Circuit's formulation, however, plaintiffs are entitled to an award of general compensatory damages without any evidence beyond that which is necessary to establish the due process violation itself.⁷ This approach to damages violates the principle that compensatory damages should reflect, as nearly as possible, the value of the actual injury sustained by the complainant. In ascertaining the parameters of the generally accepted legal principles which, under Section 1988, the federal courts are bound

(footnote continued)

firmed the judgment of the district court. This Court reversed, holding that the district court erred in failing to determine "whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." 97 S.Ct. 568, 576. Noting that the First Amendment should not provide a shield for incompetent or otherwise undesirable teachers, the Court held that a school teacher would not be entitled to back pay and reinstatement if the school board were able to show that the teacher would have been discharged in any event. Although the school board technically violated Doyle's constitutional rights by *considering* his First Amendment activity in connection with the decision to terminate his employment, the Court did not suggest that Doyle would be entitled to general compensatory damages for the constitutional violation itself.

⁷ An example illustrates one serious difficulty with the Seventh Circuit's formulation: Suppose that a student is suspended from school without a hearing at the beginning of the lunch period. He returns to school during the lunch period with an attorney, who is immediately afforded the opportunity to conduct a full adversary hearing. Before the lunch period is over, the hearing is completed and the school officials again determine that the student should be suspended. Although the student has suffered no loss, the school officials are liable for an award of general compensatory damages pursuant to the rule established by the Seventh Circuit.

to apply in civil rights cases, it is useful to consider the careful approach to measuring damages taken by the lower federal courts in cases concerning other constitutional rights.

The lower federal courts have consistently adhered to the principle that compensatory damages in civil rights cases should be strictly compensatory. The courts have frequently considered the appropriate elements of a damage award for constitutional violations in the context of public employment discharge cases, where employees have been terminated because of racial discrimination or in retaliation for the exercise of First Amendment rights. In these cases, the courts have not allowed general compensatory damages; they have consistently required proof of actual loss to the employee. Generally, an employee is entitled to damages only in an amount equal to that which he would have received if he had remained on the public payroll, less the amount that he reasonably could have received at other suitable employment. Griffis & Wilson, *Constitutional Rights And Remedies In The Non-Renewal Of A Public School Teacher's Employment Contract*, 25 Baylor L.Rev. 549, 584-7 (1973). An employee who has been discharged in violation of his constitutional rights has a duty to mitigate his damages; he will not receive a windfall. These cases demonstrate a careful adjustment of remedies to compensate only for *actual* injuries sustained by victims of racial discrimination or retaliation for First Amendment activity. General compensatory damages are not allowed even in these specially protected areas.

In *Rolfe v. County Board of Education*, 391 F.2d 77 (6th Cir. 1968), two black teachers assigned to segregated black schools were discharged because of their race when the local school board desegregated the district's schools. The former teachers brought an action for reinstatement and damages against the school board and the superinten-

dent of schools, alleging that they were discharged because of racial discrimination. The district court found that the teachers were discharged solely because of their race, and held that they "were entitled to recover as damages the amount they would have earned if they had been permitted to teach, less what they might have earned in some other suitable employment by reasonable diligence." *Id.*, 81. The Court of Appeals for the Sixth Circuit approved this measure of damages. While the school board was required to sustain the burden of proof with respect to mitigation of damages, the court held that the teachers themselves had a duty to mitigate their damages even in the wake of an unconstitutional discharge based on racial discrimination. Likewise, in *Williams v. Albemarle City Board of Education*, 508 F.2d 1242, 1243 (4th Cir. 1974) (*en banc*), the Fourth Circuit "assume[d] the correctness of the school board's contention that a teacher or school administrator, 'demoted' or discharged illegally may be precluded from the recovery of damages therefor by an unreasonable refusal to accept alternative employment." *Williams*, a black principal, was demoted to the rank of assistant principal when the school district implemented its desegregation plan. The district court found that William's demotion was racially motivated. *Accord*, *Lee v. Macon County Board of Education*, 453 F.2d 1104, 1114 (5th Cir. 1971); *McBeth v. Board of Education*, 300 F. Supp. 1270, 1275 (E.D. Ark. 1969).

In *Jannetta v. Cole*, 493 F.2d 1334 (4th Cir. 1974), a municipal fireman was discharged from public employment because he had circulated a petition, which he presented to the city manager, protesting the promotion of a fellow worker whom he believed to be unqualified for the position to which he was promoted. The district court found that the fireman was unconstitutionally discharged and ordered that he be awarded back pay from the date of discharge to the date of judgment. The Court of Ap-

peals affirmed the back pay award, in principle, but held that "the award should have been reduced by any increase in Jannetta's outside earnings attributable to his lack of employment by the fire department." *Id.*, 1335. Emphasizing the compensatory character of damages for civil rights violations under Section 1983, the Fourth Circuit noted that, "The employee should be made whole, but not enriched." *Id.*, 1338. *Accord*, *Wellner v. Minnesota State Junior College Board*, 487 F.2d 153, 157 (8th Cir. 1973).

In *Stolberg v. Members of Board of Trustees of State Colleges of Connecticut*, 474 F.2d 485 (2d Cir. 1973), a state college professor was discharged in retaliation for his exercise of First Amendment rights. The district court held that the professor, who was able to secure another college teaching position at a lower salary, was entitled to an award of compensatory damages in an amount which represented the difference in earnings between the salaries he earned or would have earned at the two colleges. Additional compensatory damages for humiliation, mental distress and injury to reputation were not allowed because the teacher had failed to sustain his burden of proof. While affirming the judgment of the district court, the Court of Appeals for the Second Circuit specifically noted that the district court's findings of fact "reveal an unpleasant picture, characterized by reactionary and rather high-handed conduct on the part of a college president toward a faculty member, approved by some trustees and tolerated by others." *Id.*, 487. Finally, in *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973) (*en banc*), *cert. denied*, 417 U.S. 908 (1974), the Tenth Circuit held that a university professor, who had been discharged without due process because of First Amendment activity, was not entitled to compensatory damages because he had found alternative employment at a comparable or higher salary. In *Smith*, the court found that the university officials had been motivated by actual malice, and that the discharged profes-

sor had been terminated without due process because he had expressed opposition to certain administration policies. Nonetheless, the court held that "the record contains no evidence to support an award of general damages." *Id.*, 344.

In each of these cases, public employees were discharged in violation of their constitutional rights to due process, equal protection of the laws, or free speech. In some cases, multiple constitutional violations occurred. Even in the most egregious cases, however, the courts did not award general compensatory damages in recognition of the constitutional violation itself.⁸ The courts limited the award

⁸ The lower federal courts have taken a similar approach to the question of damages under the Fair Housing Act, 42 U.S.C. §3601 *et seq.* Section 3612(c) provides that, "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff." 42 U.S.C. § 3612(c) (1968). As actual damages, the courts have allowed recovery of out-of-pocket losses suffered because of racial discrimination in violation of the substantive provisions of the Fair Housing Act. *Steele v. Title Realty Co.*, 478 F.2d 380 (10th Cir. 1973); *Smith v. Sol D. Adler Realty*, 436 F.2d 344 (7th Cir. 1971). If a plaintiff sustains his burden of proof, he may also receive compensatory damages for mental anguish, humiliation and emotional distress. *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974). If a violation of the Fair Housing Act is established, but no actual damages are proved, only nominal damages may be awarded. *Fort v. White*, 530 F.2d 1113 (2d Cir. 1976).

While a back pay award pursuant to Title VII of the Civil Rights Act of 1964 is, strictly speaking, an equitable remedy, this Court has emphasized that the purpose of such an award is compensatory. In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976), the Court noted that "federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." (emphasis added) (footnote omitted). See, 42 U.S.C. § 2000e *et seq.*; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

of damages to an amount necessary to compensate for injuries actually sustained because of the unconstitutional actions of state officials. Public employees were required to seek other employment and mitigate damages even when discharged for the most clearly unconstitutional reasons. Implicit in these decisions is a recognition that victims of unconstitutional activities must be made whole, but that public officials and the states should not be punished for unconstitutional acts unless the proof establishes that the proper threshold for punitive damages has been met.

C. At Most, Nominal Damages May Be Awarded In Recognition Of A Technical Breach Of A Legal Duty Which Does Not Result In Actual Injury.

In many cases, the courts have simply declined, in the absence of proof of actual injury, to award any damages for a technical violation of rights. An alternative approach has been to allow recovery of nominal damages. "The term nominal damages means a trivial sum—usually one cent or one dollar—awarded to a plaintiff whose legal right has been technically violated but who has proved no real damage." *Chesapeake & Potomac Tel. Co. v. Clay*, 194 F.2d 888, 890 (D.C. Cir. 1952). In some circumstances, the law has allowed recovery of nominal damages when an injured party has proved a violation of certain legal rights without any showing of consequential harm. Whether nominal damages will be allowed depends on the nature of the legal right that has been violated. Professor McCormick has explained this principle:

Many legal rights are rights that the person owing the duty *shall refrain from inflicting actual loss or detriment* (physical, pecuniary or otherwise) by certain kinds of conduct. Obviously, if the conduct occurs but detriment does not result, the right has not been violated. On the other hand, there is a large group of rights which are not thus conditioned, but

are so-called "absolute" rights that the person subject to the duty shall not act or refrain in a given manner at all events, regardless of whether loss or practical disadvantage results. In effect, this means that the courts will allow an adverse ruling against the party owing the duty, if he violates it, though he caused no loss. If such a right has been breached, with loss resulting, the party aggrieved gets judgment for substantial damages measured by the loss, but if breached with no loss resulting, or no loss proved, then the person aggrieved gets judgment anyway, and since practically the only kind of judgment against a party that the common law knew was a judgment for "damages," i.e., a money recovery, a judgment for trivial or "nominal" damages was given. The recognition of a right unrelated to detriment sustained is merely a metaphorical prophetic way of stating that in given conditions an adverse judgment will be given without a showing of loss.

C. McCormick, *Handbook On The Law Of Damages* § 20, p. 86 (1935) (emphasis in original).

In short, McCormick states that the appropriate remedy for a technical breach of an "absolute" right is a judgment for damages in a trivial or nominal amount. Sedgwick also states that, "It is now well established that nominal damages may be recovered for the bare infringement of a right, or for a breach of contract, unaccompanied by any actual damage." 1 T. Sedgwick, *On Damages* § 98, p. 167 (9th ed. 1912) (footnote omitted). The denial of a student's constitutional right to due process, in the absence of any proof of actual injury,⁹ is a paradigmatic

⁹ In this context, actual injury could encompass such elements as emotional and mental distress, humiliation and loss of reputation, as well as out-of-pocket and consequential pecuniary losses. The lower federal courts have recognized the availability of such damages if proved. *Piphus v. Carey*, 545 F.2d 30, 31-2 (7th Cir. 1976); *Stolberg v. Members of Board of Trustees of State Colleges of Connecticut*, 474 F.2d 485 (2d Cir. 1973).

example of a technical breach of an "absolute" right. Nominal damages would seem to be an appropriate remedy for technical civil rights violations.

While this Court has not previously considered the propriety of nominal damages in the context of a constitutional deprivation, it is significant that the Reconstruction Congress which enacted Section 1983 specifically noted the issue. Senator Thurman of Ohio made reference to the fact that, in some cases, only nominal damages might be recovered:

[Section 1983] authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; *they may be what lawyers call merely nominal damages*; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.

• • •

In the next place, I am opposed to this transfer of jurisdiction to the Federal courts because of the expense and the inconvenience that must attend it. In most of the States the Federal courts are held in not more than two places; there are very few in which they are held in as many as three places. Let an action be brought, therefore, in the Federal court, *it may be but for five dollars*, and the defendant may be dragged hundreds of miles, at great expense, to attend to the defense of the suit, and not he only, but also the witnesses who may be necessary to make out his defense.

Cong. Globe, 42d Cong., 1st Sess., App. 216 (1871) (emphasis added).

The legislative history of the Civil Rights Act of 1871 demonstrates that Congress considered and debated this legislation against the background of established principles of the law of torts. Neither the supporters nor the opponents of the legislation contemplated the possibility of an award of damages not based on actual injury. That Senator Thurman, an opponent of the Civil Rights Act, based his opposition on the fact that the legislation would open the federal courts to lawsuits involving only nominal damages, illustrates that Congress did not contemplate that substantial damages, in a speculative amount, might be awarded for technical civil rights violations in the absence of actual injury.

Following the general rule that nominal damages may be awarded when rights are technically violated, the lower federal courts have awarded nominal damages where violations of constitutional rights have not resulted in any actual injury to the person whose rights were violated. In *United States ex rel. Tyrrell v. Speaker*, 535 F.2d 823 (3rd Cir. 1976), for instance, a state pretrial detainee was arbitrarily transferred from a county jail to a state prison. When the detainee arrived at the state prison, he was immediately placed in administrative segregation, where he remained for more than eight months. In a Section 1983 action, the detainee alleged that this treatment denied him due process of law. The district court held that the defendant state officials had violated the pretrial detainee's constitutional rights by subjecting him to conditions of confinement more onerous than those which were imposed on prison inmates who had been convicted of crimes. The court also found, however, that Tyrrell was not actually prejudiced by the transfer because the conditions of his confinement in the county jail were considerably more restrictive than those of the segregation unit of the state prison to which he was wrongfully transferred. Consequently, the district court entered judgment for the

pretrial detainee, but awarded only "nominal" damages in the amount of \$500. The Third Circuit affirmed the judgment of the district court, to the extent that it allowed only nominal damages, but reduced the amount of the award to one dollar.

The First Circuit, in *Magnett v. Pelletier*, 488 F.2d 33 (1st Cir. 1973), affirmed a judgment for nominal damages in a Section 1983 action based on a warrantless search. In *Magnett*, a police officer searched an apartment without a warrant and entered a room in which four small children were sleeping. The children's father, who was also present in the apartment, sought damages from the police officer for the invasion of the apartment and for an alleged assault, which caused him physical and emotional injuries. The district court was not persuaded by the evidence that an assault had occurred, but awarded "nominal" damages in the amount of \$500 because plaintiff had established a violation of his civil rights by proving the fact of a warrantless search. The Court of Appeals held that an award of nominal damages was appropriate, but reduced the amount of the award to one dollar. The court noted that, "Nominal damages are a mere token, signifying that the plaintiff's rights were technically invaded even though he suffered, or could prove, no loss or damage." *Id.*, 35. *Accord*, *Paton v. LaPrade*, 524 F.2d 862, 871-2 (3rd Cir. 1975).

In *Bell v. Gayle*, 384 F.Supp. 1022 (N.D. Tex. 1974), three city policemen alleged that they were deprived of their constitutional rights when they were discharged without due process hearings. None of the three police officers suffered any pecuniary loss because each earned more money after the discharge than he had earned previously. The court held that the defendant city officials had violated the police officers' constitutional rights, but that no actual damages should be awarded because the officers had failed to prove any decrease in earnings. The

court awarded nominal damages, nonetheless, because "a citizen's constitutional rights are of such a value that nominal damages are presumed to flow from the deprivation of such rights." *Id.*, 1026 (emphasis added). Likewise, in *Berry v. Macon County Board of Education*, 380 F.Supp. 1244 (M.D. Ala. 1971), the court awarded only nominal damages to wrongfully discharged school board employees who had found jobs with higher pay after their discharges. The district court noted that, "Proof of a wrong done in violation of 42 U.S.C.A. § 1983 is taken as sufficient proof of nominal damages." *Id.*, 1248.

An award of nominal damages is consistent with the well-established principle that, even in civil rights cases, the purpose of a damage award is to compensate the injured party for actual losses resulting from the conduct of the wrongdoer, not to penalize the wrongdoer or to invest the injured party with a windfall. *Cordeco Development Corporation v. Santiago Vasquez*, 539 F.2d 256, 262 (1st Cir. 1976), *cert. denied*, U.S., 97 S.Ct. 488 (1977). As the First Circuit noted in *Cordeco*, "A party's financial loss is the ultimate measure of his damage." *Id.* Nominal damage awards permit the courts to recognize, symbolically, the unauthorized invasion of important rights, without artificially shifting a non-existent loss.

D. The Court Of Appeals Erred In Holding That General Compensatory Damages Must Be Awarded When A Student Proves That He Was Denied His Constitutional Right To Due Process But Fails To Establish The Existence Of Any Actual Injury.

In this case, the Court of Appeals disregarded well-established principles in holding that a civil rights plaintiff need not prove any actual injury to recover general compensatory damages in a substantial amount. The Seventh Circuit reasoned that a citizen, who has been denied

due process, need not prove any individualized injury to recover compensatory damages because general compensatory damages are "inherent in the nature of the wrong." *Piphus v. Carey*, 545 F.2d 30, 31 (7th Cir. 1976). The decision of the Seventh Circuit is inconsistent with familiar principles governing the law of damages and is, therefore, inconsistent with the limits which Congress has placed on the discretion of the federal courts under Section 1988.

The decision of the Court of Appeals in this case is consistent only with the Seventh Circuit's previous decision in *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976). In *Hostrop*, the president of a public junior college was dismissed, without a due process hearing, for reasons which the district court later held to constitute just cause. The Court of Appeals noted that "it is inconceivable that even if plaintiff had been accorded his due process rights he would have been allowed to continue in office." *Id.*, 579. Although *Hostrop* had not proved any actual loss, the court held that he was entitled to general compensatory damages, which were inherent in the nature of the constitutional violation itself:

The wrong done plaintiff was not the termination of his employment, for that has been determined to have been justified, . . . but the deprivation of his procedural due process right to notice and hearing. Plaintiff is entitled to damages for that constitutional violation.

Id.

The *Hostrop* court's award of general compensatory damages was based on an erroneous construction of this Court's decision in *Nixon v. Herndon*, 273 U.S. 536 (1927). The Seventh Circuit construed *Nixon* as establishing the principle that general compensatory damages must be awarded whenever a violation of constitutional rights is

established, even if the plaintiff fails to prove any actual loss. A close analysis of *Nixon* does not support that broad conclusion. In *Nixon*, a black citizen brought an action for damages, in the amount of five thousand dollars, against certain Texas election judges who, acting in accordance with a racially discriminatory state law, prevented him from voting in a party primary election. The district court dismissed the complaint on the ground that the subject matter of the suit was political and not within the jurisdiction of the federal courts. This Court reversed. Mr. Justice Holmes, writing for a unanimous court, said that:

The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years.

Id., 540.

The *Nixon* court had no occasion to consider the type or amount of damages which might be awarded to a black citizen who was denied the right to vote in a party primary election because of his race. The district court had dismissed Nixon's complaint, at the pleading stage, because it believed that the regulation of state party primary elections was a political matter beyond the jurisdiction of the federal courts. This Court held only that the district court erred in dismissing the complaint. While Nixon sought damages in the amount of five thousand dollars, this Court did not consider whether he would be entitled to that or any specific amount.¹⁰ Neither did the

¹⁰ Section 24 of the Judiciary Act of March 3, 1911, 36 Stat. 1091-2, now codified in relevant part as 28 U.S.C. § 1343 (1948), confers jurisdiction on the federal courts, without regard to the amount in controversy, in cases of civil rights violations such as that which formed the basis for Nixon's complaint.

Court consider the merits of any particular theory upon which Nixon would be entitled to damages of a specific type. Indeed, this Court held only that Nixon's complaint, which alleged that he had been denied the right to vote because of his race, stated a cause of action which the district court had jurisdiction to determine. Whether Nixon could recover compensatory, punitive or nominal damages was an issue which the Court left open, to be determined upon a full factual record. Contrary to the *Hostrop* court's conclusion, this Court's decision in *Nixon* did not establish that general compensatory damages must be allowed for technical violations of constitutional rights.¹¹

¹¹ The *Hostrop* court also relied on *Wayne v. Venable*, 260 Fed. 64 (8th Cir. 1919), for the principle that general compensatory damages must be awarded, without proof of individualized injury, whenever constitutional rights are violated. At first blush, the language of *Wayne* would seem to support that proposition. In *Wayne*, the Circuit Court said: "In the eyes of the law the right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right. *Scott v. Donald*, 165 U.S. 89, 17 Sup.Ct. 265, 41 L.Ed. 632; *Wiley v. Sinkler*, 179 U.S. 58, 65, 21 Sup.Ct. 17, 45 L.Ed. 84." *Id.*, 66. This Court's decisions in *Scott* and *Wiley* do not, however, support the broad conclusion stated by the lower court in *Wayne*.

In *Wiley v. Sinkler*, 179 U.S. 58 (1900), a resident of Charleston, South Carolina, brought an action for damages against certain local election officials who refused to allow him to vote in a congressional election. The Circuit Court dismissed the complaint for failure to state a cause of action because the plaintiff failed to allege that he was a duly registered voter of the State of South Carolina. This Court affirmed the dismissal, holding that the complaint did

(footnote continued)

Traditionally, the law has required proof of actual injury as a prerequisite to an award of compensatory damages in a substantial amount. In the absence of proof of actual injury, the courts have declined to award damages,

(footnote continued)

not allege facts sufficient to state a cause of action because it failed to allege that the plaintiff was a duly registered voter. *Id.*, 66. While the Circuit Court dismissed the complaint and this Court affirmed the dismissal solely on that ground, this Court discussed, in *dicta*, the other grounds for dismissal urged in the lower court.

The defendants also argued in the Circuit Court that the complaint should be dismissed because the complaint did not, on its face, affirmatively state that a federal question was involved, and because the face of the complaint demonstrated that a verdict for \$2,000 would be so excessive that the court would be required to set it aside. First, this Court noted that a federal question was clearly presented by the facts alleged in the complaint. Second, the Court said that the complaint should not be dismissed at the pleading stage for failure to meet the jurisdictional amount. "[N]o opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the Circuit Court." *Id.*, 65. The type and amount of damages which Wiley might recover could be determined only upon a full factual record. Even in *dicta*, the Court suggested only that the complaint should not be dismissed on jurisdictional grounds.

The *Wayne* court's reliance on *Scott v. Donald*, 165 U.S. 58 (1897), is also misplaced. In *Scott*, which was also cited by this Court in *Wiley*, the Court held only that *punitive* damages may be awarded in a civil rights action, and that a prayer for punitive damages will satisfy the jurisdictional amount when the amount of actual damages alleged would not. The Court said:

The intentional, malicious and repeated interference by the defendants with the exercise of personal rights and privileges secured to the plaintiff by the Constitution of the United States, as alleged in the complaint, constitutes, as we think, a wrong and injury not the subject of compensation by a mere money standard, but fairly within the doctrine of the cases wherein

(footnote continued)

or they have awarded damages only in a trivial amount to symbolize a technical breach of an important legal duty. Under Section 1988, the same principles must be applied in a Section 1983 civil rights action.

II.

Awards Of General Compensatory Damages For Technical Due Process Violations Are Improper Because They Are Punitive In Effect, Unnecessary To The Proper Enforcement Of The Civil Rights Act, And Their Potential Harm To The Public Schools Far Outweighs Any Possible Benefit To Students.

Considerations of public policy also preclude the allowance of general compensatory damage awards when a public school student's due process rights are technically violated, without actual malice on the part of the school officials or proof of actual injury to the student. First, general compensatory damages are inherently speculative and unprincipled. The Seventh Circuit's failure to articulate any precise standard for guiding the factfinder in assessing general compensatory damages underscores the arbitrary character of such an award. In effect, there is nothing to distinguish general compensatory damages

(footnote continued)

exemplary damages have been allowed. Those allegations of the complaints, though denied in the answers, have been sustained by the tribunal—in these cases the court, a jury having been waived—which had to pass upon the issues of fact.

Id., 89.

This Court's decision in *Scott* does not support the proposition that general compensatory damages must be awarded whenever a technical violation of constitutional rights occurs. Indeed, *Scott* merely supports the principle that damages, which are punitive in nature, may be allowed only when the requisite threshold of actual malice is met.

from punitive damages. By requiring awards of general compensatory damages, the Court of Appeals has required the factfinder to award damages which are punitive in fact, without requiring the proof of actual malice that is the customary prerequisite for punitive awards. Second, an adequate arsenal of remedies for the protection of civil rights currently exists. The enforcement of the civil rights acts will not be enhanced by allowing awards of general compensatory damages. Third, liability for general compensatory damage awards will seriously interfere with the local administration of the public schools. Judgments of this type must be satisfied either by individual school officials or by their school districts. If school board members must devote their personal resources to this end, capable citizens will be dissuaded from volunteering their services to the business of managing the nation's schools. If school boards choose to indemnify board members, as an incentive for them to serve, scarce public funds will be diverted from their primary purpose of financing education. In either case, the loss to the public schools will be great. Moreover, the windfall character of general compensatory damage awards makes this allocation of scarce resources particularly difficult to defend. In short, the potential harm to the public schools cannot be justified by any benefit which the imposition of liability might contribute to the enforcement of the civil rights acts in the school context.

A. General Compensatory Damages Are Improper Because They Are Punitive In Their Effect.

The Court of Appeals held that, "The award [of general compensatory damages] fixed by the District Court should be neither so small as to trivialize the right nor so large as to provide a windfall." *Piphus v. Carey*, 545 F.2d 30, 32 (7th Cir. 1976) (footnote omitted). The difficulty with

this rule of damages is clear on its face: the broad and unstructured discretion which the rule explicitly confers on the factfinder, to determine the amount of an appropriate award, is wholly inconsistent with the notion of principled compensation. Inasmuch as the court's rule offers no objective standard for measuring the extent of the injury sustained, it also fails to provide any objective standard for measuring damages. Indeed, the absence of an objective standard in the Seventh Circuit's formulation implicitly invites the factfinder to measure the extent of a "compensatory" award by reference to purely subjective factors, a measuring principle which has been limited to the realm of punitive damages.

An award of general compensatory damages based on the Seventh Circuit's formula must, by definition, be subjective, speculative and unprincipled. Moreover, an award of general compensatory damages for a technical violation of a student's due process rights, without proof of actual malice or actual injury, will be an award of damages, which is punitive in effect, without requiring the proof of aggravating circumstances that is the traditional prerequisite for an award of punitive damages. For purposes of official liability, the rule of damages set forth by the Court of Appeals eviscerates the distinction between compensatory and punitive damages.¹²

¹² One commentator has suggested that "many so-called compensatory awards in constitutional tort cases are, in fact, punitive in nature." Yudof, *Liability For Constitutional Torts And The Risk-Averse Public School Official*, 49 S.Cal.L.Rev. 1322, 1380 n. 211 (1976). It does not follow, of course, that the blurring of the compensatory-punitive distinction is a felicitous development in the law of official liability. While constructive malice may be sufficient to justify compensatory damages under *Wood v. Strickland*, 420 U.S. 308 (1975), public school officials should not be subject to liability for damages which are punitive in effect without proof of actual malice. The fact that such awards are labelled "compensatory" rather than "punitive" is immaterial.

The damage remedy as a method of punishment is generally considered suspect; its use requires caution. Even when the traditional malice threshold is met, "[a] chief criticism . . . of the doctrine of exemplary damages, is the absence of any standard or criterion to guide the jury at arriving at a proper amount." C. McCormick, *Handbook On The Law Of Damages*, § 85, p. 296 (1935). While the need for discouraging truly malicious conduct may sometimes justify an award of punitive damages, for want of a better method of deterrence, the unstructured discretion implicit in the power to award punitive damages cannot be justified without proof of actual malice or other aggravating circumstances. Certainly, it may not be justified as a principle of compensation, rather than punishment.

In a broader sense, punitive damages may be undesirable as a matter of public policy, even when actual malice exists, because the moral force and retributive effect of punitive damages may unnecessarily upset particularly delicate and felicitous relationships. One commentator has noted, for instance, that punitive damages may be counterproductive in the labor context: "Giving judicial recognition to the kind of moral distinctions involved in retributive awards would exacerbate relations between unions and employers and thereby contravene the central purpose of the [Labor Management Relations] Act." Note, *Punitive Damages Under Federal Statutes: A Functional Analysis*, 60 Cal.L.Rev. 191, 207 (1972). See also, *United Auto Workers v. Russell*, 356 U.S. 634, 653 (1958) (Warren, C.J., dissenting). The sensitive nature of educational relationships, the need to encourage civility in the schoolroom and the need to discourage the development of adversary relationships among those interested in the educational process, suggest that a similar reluctance to award punitive damages may be advisable in the educa-

tional context. See, Kirp, *Proceduralism And Bureaucracy: Due Process In the School Setting*, 28 Stan.L.Rev. 841 (1976).

Even if punitive damages, in an orthodox sense, may occasionally be necessary in the school context, punitive damages should not be allowed in the guise of general compensatory damages when the traditional prerequisites for punitive damages are not met. The allowance of general compensatory damages would exacerbate delicate relations, between students, teachers, parents and school board members, upon which the success of the public schools is founded. Strong considerations of public policy require that the threshold requirements for punitive damages should be maintained in the school context. For this reason, general compensatory damages should not be allowed when students' due process rights are violated without actual malice or injury.

B. An Arsenal Of Adequate Remedies Currently Exists To Vindicate The Civil Rights Acts.

Whether the allowance of general compensatory damages would substantially enhance the enforcement of the federal civil rights acts is a question which must be considered against the background of presently existing remedies. In the analogous area of implied constitutional remedies, under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), one commentator has suggested that the focus for analysis should be "upon whether there are other remedies available to those in the plaintiff's position that would as fully effectuate the purposes of the constitutional guarantee as the remedy sought." Dellinger, *Of Rights And Remedies: The Constitution As A Sword*, 85 Harv.L.Rev. 1532, 1551 (1972). A review of existing remedies demonstrates that

an arsenal of remedies presently guarantees that a student's civil rights will be effectively vindicated in the event of an unconstitutional suspension.

A student who is suspended from school without due process may recover actual damages. In *Wood v. Strickland*, 420 U.S. 308, 322 (1975), this Court held that, "A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." While recognizing the necessity for a qualified immunity in the school context, the Court held in *Wood* that school officials are liable for actual damages sustained by students who have been deprived of their constitutional rights through actions of school officials that do not meet the qualified immunity requirements.

In addition to pecuniary or out-of-pocket loss, the lower federal courts have held that compensatory damages in Section 1983 cases may also encompass compensation for loss of reputation, mental and emotional distress, or pain and suffering, if these elements are supported by proof. *Piphus v. Carey*, 545 F.2d 30, 31 (1976). In *Donovan v. Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970), the Ninth Circuit held that an unconstitutionally discharged public employee was entitled to damages for emotional and mental distress arising out of the wrongful discharge when he presented evidence sufficient to support that element of damages. Likewise, in *Stolberg v. Members of Board of Trustees of State Colleges of Connecticut*, 474 F.2d 485, 489 (2d Cir. 1973), the Second Circuit noted that an unconstitutionally discharged college professor could recover compensatory damages, in a Section 1983 action, for humiliation, distress and injury to reputation, upon proof of having sustained

these injuries. In *Stolberg*, the Court of Appeals affirmed the district court's denial of any award for injury to reputation, humiliation or distress, however, on the ground that *Stolberg* had failed to prove these elements of injury. The court emphasized that a civil rights plaintiff must sustain the burden of proving damages for injury to reputation, humiliation and distress; these elements of damages will not be presumed from the fact of the constitutional violation itself.

The lower federal courts have also held that a party whose civil rights have been violated may recover punitive damages, in an appropriate case, if he is able to establish either the existence of aggravating circumstances or that the person who acted under color of state law to deprive him of his constitutional rights was motivated by actual malice. *Hague v. Committee For Industrial Organization*, 101 F.2d 774, 789 (3rd Cir. 1939), *mod. on other grounds*, 307 U.S. 496 (1939). In *Basista v. Weir*, 340 F.2d 74, 87-8 (3rd Cir. 1965), the Third Circuit held that punitive damages may be awarded for an illegal arrest when only nominal damages are proved. Other courts have held that punitive damages may be awarded, provided that aggravating circumstances are present, in the absence of proof of actual loss. *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974).

In addition to actual compensatory and punitive damages, numerous remedial devices exist for the vindication of federal civil rights. In an appropriate case, a civil rights plaintiff may secure injunctive and declaratory relief against unconstitutional state activities. *Gibson v. Berryhill*, 411 U.S. 564 (1973). To further encourage private parties to vindicate their constitutional rights, Congress has recently amended Section 1988 to provide that the federal courts may, in their discretion, award

reasonable attorneys' fees to the prevailing party in civil rights litigation. 42 U.S.C. § 1988 (1976). See, 1976 U.S. Code Cong. & Ad. News 5908. Together with the substantive remedies previously recognized by the federal courts, the attorneys' fees provision of Section 1988 guarantees that meritorious civil rights claims will continue to be pressed in the federal courts.¹³ Finally, the possibility of criminal prosecution for certain wilful violations of federal civil rights under color of state law provides an additional incentive for compliance with the federal civil rights statutes. 18 U.S.C. § 242 (1948). See, *Screws v. United States*, 325 U.S. 91 (1945).

The American tradition of local community control of the public schools also provides special safeguards for the protection of students' constitutional rights. Local control of the public schools, by persons elected or appointed by their communities, necessarily creates a climate of responsibility in which school officials are held strictly accountable for their actions. "[B]y virtue of electing them the constituents have declared the Board members qualified to deal with these problems, and they are accountable to the voters for the manner in which they perform." *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 496 (1976). Certainly, a local community will not long tolerate school officials who do not respect the constitutional rights of the community's children. As the Court noted in *Ingraham v. Wright*,

¹³ The number of civil rights cases filed in the federal courts has increased steadily in recent years. In 1944, only 21 cases were filed. Note, *The Proper Scope of The Civil Rights Acts*, 66 Harv.L.Rev. 1285 (1953). In 1975, 6461 civil rights cases, excluding prisoner and employment discrimination cases, were filed. Judicial Conference of the United States, Rep. of Proc.: Ann. Rep. of Director of Ad. Off. of U.S. Courts 346 (1976).

U.S., 97 S.Ct. 1401, 1412 (1977), "The openness of the public school and its supervision by the community afford significant safeguards against the kind of abuses from which the Eighth Amendment protects the prisoner." While the Court was speaking of corporal punishment in *Ingraham*, the same principle applies to the protection of other constitutional interests. The openness of the schools to public scrutiny is a powerful deterrent to school officials who might be tempted to violate the constitutional due process rights of students. As one school official has suggested, a school administrator's self-interest will also aid in dissuading him from violating students' constitutional rights in the interest of administrative expediency:

Any school administrator who is finally adjudged to have violated an individual's civil rights has not only had a considerable punishment in terms of a hurt reputation, but also in his employment relationship with his school district. His future even may be injured considerably.

Shannon, *Goss and Wood: Their Implications For School Practice*, 4 J.Law & Ed. 611, 613 (1975).

Shannon's observation applies equally to professional educators and lay school board members. Just as professional educators must expect that unconstitutional activities will adversely affect their careers in public education, school board members must face the probability that a pattern of constitutional violations will adversely affect the likelihood of their re-election or re-appointment to office.

In most cases, a civil rights plaintiff will be able to show that he is entitled either to actual compensatory damages, because of actual injuries sustained, or to injunctive and declaratory relief. If an injured party is able to prove aggravating circumstances or actual malice, he may also be entitled to punitive damages. An award of general

compensatory damages, to a party who fails to establish actual injury sufficient to justify actual damages or actual malice sufficient to justify punitive damages, will constitute a mere windfall, regardless of the amount. Given the arsenal of existing remedies, as well as the special safeguards provided in the school context, an award of general compensatory damages will have little material effect on the enforcement of the civil rights acts.

C. The Detriment To The Public Schools From General Compensatory Damage Awards Far Outweighs The Potential Benefit To Students.

The decision to impose additional liability on public officials always requires a balancing of the benefits to be gained against the harm that will result. Professor James has noted that:

On the one hand [official liability] will tend to curb high-handed official action and other bureaucratic excesses. On the other, it will often inhibit objective and fearless action and discourage responsible men from taking public employment.

James, *Tort Liability Of Government Units And Their Officers*, 22 U.Chi.L.Rev. 610, 639 (1955) (footnote omitted).

While awards of general compensatory damages will have little effect on the enforcement of the civil rights acts, the threat of liability for such speculative awards will interfere significantly with the administration of the public schools. If public school officials are held liable for awards of general compensatory damages, judgments for these additional awards must be satisfied either from the personal funds of the officials or through some system of school district indemnification of school officials. Neither of these alternatives is desirable in terms of educational planning and financing.

Historically, the system of public education in the United States has depended upon the willingness of local community members to provide their services, usually without personal remuneration, to the business of managing the nation's public schools. The threat of substantial judgments for general compensatory damages could drastically disrupt these traditional arrangements. As this Court said in *Wood*, "The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure." *Wood v. Strickland*, 420 U.S. 308, 320 (1975) (footnote omitted). The speculative nature of general compensatory damages necessarily prevents a rational assessment of the actual risk of liability, and it must be assumed that the threat of liability for awards of general compensatory damages will have an inordinately great deterrent effect on the willingness of capable citizens to undertake the tasks of school management. The alternative of school district indemnification of board members may be equally undesirable in that it would divert already scarce public funds from general educational purposes to satisfy judgments won by individual students who have suffered no actual injury.¹⁴

¹⁴ From an economic perspective, it might be suggested that higher salaries would compensate public officials for the financial risks inherent in personal liability for general compensatory damages. This solution is inappropriate in the school context because "[m]ost of the school board members across the country receive little or no monetary compensation for their service." *Wood v. Strickland*, 420 U.S. 308, 320 n.11 (1975). An alternative solution is insurance coverage. The cost of insurance coverage in this area has been great, however, because of the absence of sound actuarial statistics concerning civil rights violations. If general compensatory damages are allowed in these cases, the speculative and uncertain amounts of these damages will further encumber the actuarial process (footnote continued)

The financial difficulties of the nation's school systems are well known. While yearly expenditures for elementary and secondary education have risen from \$18 billion to \$75.1 billion in the past sixteen years,¹⁸ one-half of the nation's population currently believes that too little money is being spent to improve the quality of American education. National Center for Education Statistics, *The Condition Of Education: A Statistical Report On The Condition Of Education In The United States*, 26, 53 (1976).

(footnote continued)

and will, consequently, further increase the cost of insurance coverage. Moreover, in some states, statutes prohibit insurance companies from paying damages awarded against a public official. In those states, insurance policies will be useful only in paying the costs of defense. Note, *The Right Insurance May Protect Your District And Your Wallet Alike*, 163 Am.Sch.Board J. 30 (1976). Even when available at a reasonable premium, however, insurance policies may be limited in value because of the difference in perspectives, between the insurance carrier and the school district, concerning the desirability of particular methods of conflict resolution. In an action for money damages and injunctive relief, for instance, an insurance carrier will probably concentrate on its own damage exposure while the school district, for sound educational reasons, may be more interested in achieving an acceptable solution to the injunctive element of the litigation. Shannon, *Goss and Wood: Their Implications For School Practice*, 4 J.Law & Ed. 611, 613 (1975). Professor Yudof has concluded that, "When the various pieces of the legal defense, indemnification and governmentally purchased insurance puzzle are put together, the picture that emerges for school officials is grim." Yudof, *Liability For Constitutional Torts And The Risk-Averse Public School Official*, 49 S.Cal.L.Rev. 1322, 1386-87 (1976).

¹⁸ It is estimated that by 1980, an additional \$24.5 billion in annual spending will be required to sustain the 1964-1974 rate of improvement in public school programs. McBride, *Where Will The Money Come From? Financing Education Through 1980-81*, 58 Phi Delta Kappan 248 (1976).

With the dramatically increasing costs of providing public services, school boards have found themselves engaged in fierce competition with other government agencies for scarce public funds. Shalala & Kelly, *Politics, The Courts And Educational Policy*, 75 Teachers C.Rec. 223, 229 (1973).

Current difficulties of school administration and financing would be severely aggravated if school districts were required to choose between indemnification and personal liability in satisfying judgments for general compensatory damages. In *Wood*, the Court recognized that strong considerations of public policy supported the imposition of a limited liability for compensatory damages upon public school officials. Those policy considerations do not support the imposition of liability for *general* compensatory damages. Inasmuch as judgments of this type would be unrelated to any actual harm sustained by the students whose rights were technically violated, the public policy rationale for imposing this costly choice on local school districts loses its vitality. Moreover, the likelihood that such a remedy would materially assist in enforcing the civil rights acts is so small as to make the imposition of this choice untenable.

This Court has frequently noted that, "The Fourteenth Amendment did not alter the basic relations between the States and the national government." *Screws v. United States*, 325 U.S. 91, 109 (1945). In *Younger v. Harris*, 401 U.S. 37, 44 (1971), the Court said that the relations between the states and the national government should be guided by "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." The federal government must

act to vindicate and protect federal rights and federal interests, but it must always endeavor "to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* As Mr. Justice Frankfurter has said, "respect for principles which this Court has long regarded as critical to the most effective functioning of our federalism should avoid extension of a statute beyond its manifest area of operation into applications which invite conflict with the administration of local policies." *Monroe v. Pape*, 365 U.S. 167, 241-2 (Frankfurter, J., dissenting).

Whether the technical denial of a student's due process rights, without actual malice or injury, should give rise to an action for damages, which are compensatory in theory but punitive in fact, presents a question which is fundamental to federalism and to this nation's tradition of local control of the public schools. Considerations of federalism and comity are always present in civil rights cases challenging the activities of state officials. As Mr. Justice Frankfurter noted, "Necessarily, the construction of the Civil Rights Acts raises issues fundamental to our institutions." *Monroe v. Pape*, 365 U.S. 167, 222 (1961) (dissenting opinion). These considerations of federalism and comity are particularly significant in cases involving the public schools because "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Throughout our history, the conduct of the nation's public schools has rested within the province of the states and local governmental units. N. Edwards, *The Courts And The Public Schools* 23 (3rd ed. 1971). The Court has frequently noted the important interests served by this nation's commitment to local control of the public schools: "The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. . . . No area of social concern stands to profit more

from a multiplicity of viewpoints and from a diversity of approaches than does public education." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 49-50 (1973). See also, *Wright v. Council of City of Emporia*, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting). The federal courts must, consequently, be solicitous of the arrangements which state and local governments have devised for the management of the public schools, and those arrangements must not be disturbed without good cause. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

By sanctioning gratuitous awards of general compensatory damages, for merely technical violations of students' due process rights, this Court would seriously alter presently existing arrangements for administering the public schools. The financial impact of speculative and substantial awards upon school board members or the local schools would be dramatic. If judgments are to be satisfied by local school districts, scarce financial resources will be diverted from educational uses. If judgments must be satisfied by board members from their personal wealth, many capable citizens will be needlessly deterred from offering their services on behalf of the nation's schools. This restriction on the important supply of human resources now available to the schools would have serious effects. Indeed, this nation's commitment to local lay control of the schools might well be jeopardized in either case. The harm to the public schools clearly outweighs any marginal benefit which might arguably be gained in terms of effective enforcement of the civil rights acts.

CONCLUSION

Section 1988 requires that the federal courts fashion appropriate remedies, based on generally accepted legal principles, for vindication of the federal civil rights acts. In the absence of proof of actual injury, traditional principles of the law of remedies provide that no damages, or only nominal damages, may be awarded to a party whose rights have technically been violated. These principles, together with considerations of comity, federalism and school policy, foreclose an award of general compensatory damages in the circumstances of this case. For these reasons, National School Boards Association respectfully urges that the decision of the United States Court of Appeals should be reversed.

Respectfully submitted,

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